

DORETHA L. HORN
Claimant

ST. JOSEPH MEDICAL CENTER
Respondent
Self-Insured

KANSAS WORKERS COMPENSATION FUND

ORDER

ISSUES

Respondent seeks review of the issue of whether the Administrative Law Judge exceeded her jurisdiction by granting claimant temporary total disability benefits when, as a matter of law, claimant's condition must be considered permanent. Respondent concedes that the compensability of claimant's psychological condition is not an issue presently before the Board on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant's accident occurred on October 11, 1994. Respondent points out that claimant has already received 2 ½ years of temporary total disability benefits. She has been treating with Dr. McNamara since 1995 and it is unknown when the claimant's condition may improve to the point where she can return to substantial gainful employment. Dr. McNamara opined in a letter dated March 14, 1997, that claimant's "current psychological disability is permanent in that she is very likely to remain disabled for as long as three years." Accordingly, respondent contends the Administrative Law Judge exceeded her jurisdiction by granting claimant temporary total disability benefits when, as a matter of law, claimant's condition must be considered permanent.

The Appeals Board has limited jurisdiction to review preliminary hearing orders. K.S.A. 1997 Supp. 44-551(b)(2)(A) provides that "[i]f an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing." In addition, K.S.A. 1997 Supp. 44-534a(a)(2) lists several findings concerning issues which, if in dispute, are to be considered jurisdictional and subject to review by the Board. A finding concerning whether a claimant is temporarily and totally disabled is not one of those jurisdictional issues.

K.S.A. 1997 Supp. 44-534a gives an Administrative Law Judge the authority to conduct a preliminary hearing which shall be summary in nature and "[u]pon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation" K.S.A. 1997 Supp. 44-534a(a)(2). The compensability of the claim is not disputed. What is disputed is the Administrative Law Judge's authority to grant temporary total disability when claimant's condition should now be considered permanent. According to respondent, what makes this issue jurisdictional and, therefore, appealable to the Appeals Board from a preliminary order is that the issue before the Board is a matter of law, not an issue of fact. In other words, it is not that the Administrative Law Judge erred by concluding claimant's condition was not at maximum medical improvement and consequently ordered continued payment of the temporary total disability that makes this a jurisdictional issue, but rather because the facts of this case allow no other conclusion but that claimant's condition is permanent. The existence, nature, and extent of disability of a workers compensation claimant, however, is a question of fact. Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, Syl. ¶ 1, 924 P.2d 1263 (1996), *rev. denied* ___ Kan. __.

Respondent cites Rose v. Thornton & Florence Electric Co., 4 Kan. App.2d 669, 609 P.2d 1180, *rev. denied* 228 Kan. 807 (1980), for the proposition that "where it is reasonably probable that a worker's disability will continue for an indefinite or indeterminate period of

time, the disability is considered permanent in nature.” 4 Kan. App.2d 672. The controversy surrounds the question of whether it is reasonable to expect claimant’s condition to improve within a discernible period of time. That is a question of fact to be determined by the Administrative Law Judge. She determined that claimant’s psychological condition is not medically stable. The Appeals Board does not read the record as precluding the possibility that claimant’s condition will improve. Dr. McNamara’s letter, which was written approximately one year ago, gives a basis to conclude that there may be significant improvement within a three year time frame. This conclusion is supported somewhat by the more recent opinions given by Dr. McNamara regarding the progress claimant has made in her treatment. The issue raised by respondent concerning whether or not temporary total disability compensation should have been terminated is, accordingly, not a jurisdictional issue.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that it does not have jurisdiction to review the March 4, 1998, Order at this juncture of the proceeding and that respondent’s application for review should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Vaughn Burkholder, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director